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NATIONAL ABORTION FEDERATION (NAF)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NATIONAL ABORTION FEDERATION (NAF),

Plaintiff,

v.

THE CENTER FOR MEDICAL PROGRESS,
BIOMAX PROCUREMENT SERVICES LLC,
DAVID DALEIDEN (aka "ROBERT SARKIS"),
and TROY NEWMAN

Defendants.

Case No. 3:15-cv-3522-WHO

Judge William H. Orrick, III

**REPLY IN SUPPORT OF
NATIONAL ABORTION
FEDERATION'S MOTION FOR
ATTORNEYS' FEES**

Location: Courtroom 2, 17th Floor

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INTRODUCTION

NAF's motion established that it was the prevailing party and that NAF was entitled to reasonable attorneys' fees of \$6,933,374.25 under the Exhibitor Agreement and Cal. Civ. Code § 1717. In support of that amount, NAF filed a thirty-one page declaration, detailing the work performed in this six-year old action, the litigation tasks timekeepers performed, and the reasonableness of each timekeeper's hourly rates. In addition, NAF has submitted nearly 5,000 time entries that provide further detail about the time reasonably spent on this action. These materials show the reasonableness of NAF's request for \$6,933,374.25. That amount is nearly 40% less than the fees actually incurred because NAF voluntarily excluded all timekeepers who billed less than 100 hours and, for the remaining timekeepers, took a 25% across-the-board deduction. The reasonableness of NAF's request is plain on its face.

In response, Defendants do not dispute that NAF is the prevailing party or that Morrison & Forester's hourly rates are reasonable. Instead, Defendants contend, based on two cases applying out-of-state law, that NAF is entitled to no fees at all because the Exhibitor Agreement purportedly precludes fee awards when a party is represented pro bono. But decades of California law puts that contention to bed. Defendants also contend that NAF is not entitled to fees because it did not obtain relief based on the Exhibitor Agreement. The Court need look no further than its summary judgment order to reject that argument. Defendants' other arguments amount to meritless grumblings about the number of hours spent on this litigation.

NAF respectfully requests that the Court award it \$6,933,374.25 in attorneys' fees.

ARGUMENT

I. NAF IS ENTITLED TO ATTORNEYS' FEES.

NAF's motion showed that it was the "prevailing party" and therefore entitled to attorneys' fees under Section 1717 and the Exhibitor Agreements. (ECF No. 727 at 16-17.) Those agreements provide that "[e]xhibitors agree to reimburse NAF for all costs incurred by NAF, including reasonable attorneys' fees, in handling or responding to any violations of any provision of this entire Agreement." (ECF Nos. 666-12, 666-13 ¶ 16.) Though Defendants do not deny that NAF is the prevailing party, they nevertheless contend that NAF is not entitled to

any fees at all because NAF supposedly did not incur fees and because NAF purportedly did not obtain relief based on the Exhibitor Agreement. Those arguments entirely lack merit.

A. Under California Law NAF Is Entitled To Its Fees.

Defendants attempt to sidestep NAF's showing by arguing that Section 1717 is inapposite because its only purpose is to provide reciprocity in contractual attorney's fees provisions. (ECF No. 759 at 7 n.1) ("Opp."). Then, pointing to cases interpreting out-of-state law, Defendants argue that NAF has "incurred" no fees to "reimburse" because Morrison & Foerster represents NAF pro bono. (*Id.* at 5-7 (citing *TruGreen Cos., LLC v. Mower Bros.*, 570 F. App'x 775, 777 (10th Cir. 2014); *Deitz v. Univ. of Denver, Colo. Seminary*, No. 95-cv-02756-WDM-OES, 2011 WL 2559829, at *4-5 (D. Colo. June 28, 2011)).) A long line of California cases reject both arguments. Indeed, "the claim 'that a losing party . . . should not have to pay [contractual] attorney fees if the prevailing party did not, in fact, have to pay' them 'has been rejected numerous times.'" *Int'l Billing Servs., Inc. v. Emigh*, 84 Cal. App. 4th 1175, 1193 (2000) ("*IBS*") (discussing Section 1717; ellipses in original) (quoting Richard Pearl, *Attorney Fee Awards Based on Contract* § 6.16, in *Cal. Attorney Fee Awards* (Cont. Ed. Bar. 1999) (emphasis added)).

First, Section 1717 "govern[s]" all "agree[ments] to allocate attorney fees by contract." *Gilbert v. Master Washer & Stamping Co.*, 87 Cal. App. 4th 212, 216-17 (2001), *as modified* (Mar. 13, 2001) (interpreting Section 1717 to award contractual attorneys' fees). Section 1717 "establish[es] [the] uniform treatment of fee recoveries in actions on contracts containing attorney fee provisions and [] eliminate[s] distinctions based on whether recovery [is] authorized by statute or by contract." *PLCM Grp. v. Drexler*, 22 Cal. 4th 1084, 1091 (2000), *as modified* (June 2, 2000). Said differently, under Section 1717, contractual attorney's fees are "seen as allowed by statute, rather than by contract" and "equitable considerations must prevail over both the bargaining power of the parties and the technical rules of contractual construction." *Id.*

Second, California courts routinely reject interpretations of attorneys' fees provisions that purport to limit recovery to litigants who have actually incurred attorneys' fees. *See IBS*, 84 Cal. App. 4th at 1192-95; *Beverly Hills Props. v. Marcolino*, 221 Cal. App. 3d Supp. 7, 11-12 (1990) (awarding contractual attorneys' fees for pro bono representation). *IBS* rejected the same

1 argument Defendants make here, about a materially identical attorneys’ fee provision: “You
 2 promise to reimburse Company for any legal fees, liability, or loss which Company incurs”
 3 84 Cal. App. 4th at 1180. There, plaintiffs argued that defendants did not “incur” any fees to be
 4 “reimburse[d]” because defendants’ new employer paid the defendants’ attorneys. *Id.* at 1192,
 5 1194. But that interpretation “reads ‘incurs’ out of the agreement,” and attempts to turn an
 6 attorneys’ fee provision into an indemnity provision, in contravention of Section 1717. *Id.* at
 7 1194. So, the court affirmed the award of attorneys’ fees, explaining that the plaintiffs “s[ought]
 8 a windfall” based on the “serendipity” that defendants had “discovered how to defend the lawsuit
 9 without having to pay out of their pockets.” *Id.* at 1193-94. The same analysis applies here.

10 California courts reach the same conclusion when interpreting contractual attorneys’ fees
 11 provisions through the lens of Section 1717. In *Beverly Hills*, a case relied on by *IBS*, 84 Cal.
 12 App. 4th at 1194-95, a tenant sought fees under a bilateral attorneys’ fee provision that forbid a
 13 fees award when “the attorney for the successful party is not going to charge such successful
 14 party.” *Beverly Hills*, 221 Cal. App. 3d Supp. at 10. After the trial court awarded fees, the losing
 15 party appealed, arguing that because the tenant was represented pro bono, the plain language of
 16 the contract prohibited the award. *Id.* at 9-10. The court again rejected that argument. *Id.* at 12.
 17 Despite the bilateral attorneys’ fees provision, Section 1717 nevertheless applied and, therefore,
 18 the analysis did not turn on the contract’s language, but instead on Section 1717. *Id.* at 10; *see*
 19 *also In re Tobacco Cases I*, 193 Cal. App. 4th 1591, 1598-99 (2011) (awarding contractual fees
 20 based on Section 1717, rather than contract). And Section 1717 “does not expressly require the
 21 prevailing party to incur legal expenses,” but rather provides for attorneys’ fees “‘which are
 22 incurred to enforce the contract,’” including fees incurred by the prevailing party’s pro bono
 23 attorneys. *Beverly Hills*, 221 Cal. App. 3d Supp. at 11 (emphasis in original) (quoting Section
 24 1717(a)).

25 A legion of cases interpret the word “incur” similarly and reject the argument that
 26 attorneys’ fees may only be awarded when the prevailing party actually pays fees. *See Lolley v.*
 27 *Campbell*, 28 Cal. 4th 367, 373 (2002) (“[I]t has been generally agreed that a party may ‘incur’
 28 attorney fees even if the party is not personally obligated to pay such fees. ‘A party’s entitlement

1 to fees is not affected by the fact that the attorneys for whom fees are being claimed were funded
 2 by governmental or charitable sources or agreed to represent the party without charge.”) (citation
 3 omitted); *Rosenauro v. Scherer*, 88 Cal. App. 4th 260, 283 (2001) (relying on cases interpreting
 4 Section 1717 to conclude that attorney’s fees that are waived are still “incurred”); *Moran v. Oso*
 5 *Valley Greenbelt Ass’n*, 117 Cal. App. 4th 1029, 1036 (2004) (“Modern jurisprudence does not
 6 require a litigant seeking an attorney fee award to have actually incurred the fees.”); *Do v. Super.*
 7 *Ct.*, 109 Cal. App. 4th 1210, 1215-16 (2003) (rejecting argument that sanctions should not be
 8 awarded because litigant was represented pro bono and incurred no attorneys’ fees).¹

9 Defendants do not and cannot contend that Morrison & Foerster has not “incurred” legal
 10 fees by representing NAF over the past six years. So, Defendants are “not entitled to avoid their
 11 contractual obligation to pay reasonable attorney fees based on the fortuitous circumstance that”
 12 NAF arranged to be represented pro bono. *See IBS*, 84 Cal. App. 4th at 1193.

13 **B. The Court Granted Summary Judgment Based on Defendants’ Breach of the**
 14 **NAF Agreements, including the Exhibitor Agreement.**

15 Defendants are also wrong that NAF is not entitled to attorneys’ fees because NAF
 16 purportedly did not obtain relief on the Exhibitor Agreement. (Opp. at 7-8.) Rather, the Court
 17 granted summary judgment and entered a permanent injunction based on Defendants’ breach of
 18 the Confidentiality Agreements (“CA”) and the Exhibitor Agreements (“EA”) (collectively, the
 19 “NAF Agreements”). The Court could not have been more clear when it rejected Defendants’
 20 attempt to sever the two agreements, and granted summary judgment based on issue preclusion
 21 because the PPFA case “established” “the identical issue—breach of the NAF EAs and CAs[.]”
 22

23 ¹ Published Tenth Circuit authority agrees. In *Centennial Archaeology v. AECOM, Inc.*,
 24 the court explained that “the adjective *incurred* adds nothing (except, perhaps, emphasis) when
 25 modifying the term *attorney fee*, because in common usage a fee is something incurred.” 688
 26 F.3d 673, 681 (10th Cir. 2012) (emphases in original). And the term “attorney fees” is a “term of
 27 art” that “means, not the amount actually paid or owed by the party to its attorney, but the value
 28 of attorney services provided to the party.” *Id.* at 678-79 (discussing attorneys’ fee statutes and
 rules). Though *Trugreen* (the unpublished case Defendants cite) dismisses *Centennial*
Archaeology with a wave—cases interpreting statutes and rules do not “necessarily dictate the
 proper interpretation of the parties’ contract”—*Trugreen* provides no persuasive reason to reject
Centennial Archaeology’s explanation about the “common usage” of the terms. *See Truegreen*,
 570 F. App’x at 778. In any event, *Trugreen* and *Deitz* do not involve California law.

(ECF No. 720 at 8.) The Court also specifically and repeatedly concluded that Defendants violated the EA: the Permanent Injunction is “directly related to and stems from defendants’ breach of specific provisions in the NAF Agreements,” which the Court defined as including both the EA and the CA. (*Id.* at 3, 10; *see also id.* at 10-11 (discussing that the “defendants knowingly and intelligently signed the EAs” and that “[t]he evidence at the *PPFA* trial established that Daleiden *knew* what he was signing when he signed the two EAs”).) That is why the Court granted summary judgment on NAF’s Sixth Cause of Action (Breach of Contract), which included both NAF Agreements, and entered the Permanent Injunction as a remedy. (ECF Nos. 131 ¶¶ 193-200, pp. at 73-74 (Prayer for Relief); ECF Nos. 720 at 7-8; 723 at 1.)

Seeing the writing on the wall (or in the order), Defendants switch to arguing that NAF did not obtain relief on the EA because the Court declined to permanently enjoin Defendants from attempting to enter future NAF meetings. (Opp. at 7-8.) That argument defies logic. That the Court did not bar Defendants from *future* attempts to enter NAF’s facilities has no bearing on whether Defendants breached the Exhibitor Agreement *in the past*. (*See* ECF No. 720 (distinguishing between NAF’s proof of past breaches of the Exhibitor Agreement and unproven future attempts to access NAF’s meetings using misrepresentations).) That is exactly what the Court concluded: Defendants “only gained access to” information learned at the 2014 and 2015 NAF conferences “due to [Defendants’] breaches of the NAF Agreements.” (ECF No. 720 at 20.)

The Court adjudged that the Defendants breached both the EA and the CA. Accordingly, NAF is the prevailing party and entitled to attorneys’ fees.

II. NAF’S REQUESTED FEE IS REASONABLE.

As NAF is the prevailing party, it is entitled to reasonable attorneys’ fees. Notably, Defendants do not challenge the reasonableness of NAF’s attorneys’ fees based on Morrison & Foerster’s billing rates. Instead, Defendants argue only that NAF’s requested fees are unreasonable because (1) they are purportedly disproportionate to the relief achieved; and (2) some of NAF’s nearly five thousand time note entries supposedly lack sufficient detail. Those arguments lack merit and ignore the six year history of this case, as well as NAF’s \$4.6 million (or nearly 40%) voluntary reduction, which includes both excluding numerous timekeepers who

1 billed less than 100 hours and a 25% across-the-board haircut.² (ECF No. 756-2 ¶¶ 3, 8 (NAF
 2 incurred \$11,549,163.00 in fees, but is seeking only \$6,933,374.25).) NAF’s requested attorneys’
 3 fees are proportionate and reasonable.

4 **A. NAF’s Request is Proportionate in Light of the Length, Scope, and**
 5 **Complexity of This Case.**

6 Defendants misleadingly argue that NAF seeks a “staggering amount for a breach of
 7 contract case which was resolved at summary judgment.” (Opp. at 10-11 (quoting *Banas v.*
 8 *Volcano Corp.*, 47 F. Supp. 3d 957, 965 (N.D. Cal. 2014)).)³ As this Court well knows, this six-
 9 year old case “has been actively litigated, to say the least” (*see* ECF No. 452 at 1), and cannot be
 10 summed up merely as a “contract case resolved on summary judgment.” (Opp. at 10.) Rather,
 11 Defendants’ zealous (and sometimes frivolous) advocacy extended the litigation and required
 12 NAF to respond to numerous filings and issues that do not come up in run-of-the-mill contract
 13 cases.

14 To name a few, Defendants intentionally violated the Preliminary Injunction, necessitating
 15 contempt proceedings, and then moved to disqualify this Court two years into litigation; filed nine
 16 writs and appeals, all of which were resolved in NAF’s favor; moved to dismiss the complaint
 17 over three years and 550 docket entries after NAF initiated suit; refused to produce corporate
 18 documents based on arguments that “contravene[d] a long line of case law” spanning over 100
 19 years, then continued their “shell game” by refusing to produce the same documents based on
 20 other misguided theories and moving for reconsideration, and then sought a writ of mandamus
 21 (the second in fewer than six months), both of which were denied.

22 Regardless of whether Defendants accurately claim that they have “fairly” attempted to

23

² In addition, NAF is not seeking fees for filing this reply brief in support of its motion for
 24 attorneys’ fees or for any time spent reviewing and redacting nearly 5,000 time entries.

25 ³ Defendants’ reliance on *Banas* is woefully misplaced. *Banas* involved a breach of
 26 contract claim that was resolved, including the attorneys’ fees motion, in less than three years.
 27 *Banas*, 47 F. Supp. 3d at 961. Further, without taking any voluntary reduction, the *Banas*
 28 defendants sought \$3.5 million in attorneys’ fees based on “remarkably deficient” documentation.
Id. at 965. Despite the court characterizing the amount as “eye-catching” and “huge,” it
 nevertheless awarded nearly \$2.6 million in attorneys’ fees—a 25% reduction. *Id.* at 961. Here,
 NAF voluntarily reduced its fees by nearly 40%. (ECF No. 756-2 ¶¶ 3, 8).

1 mount a defense (Opp. at 8), Defendants “cannot litigate tenaciously and then be heard to
 2 complain about the time necessarily spent by the plaintiff in response.” *Instrumentation Lab’y*
 3 *Co. v. Binder*, No. 11cv965 DMS (KSC), 2013 WL 12049072, at *4 (S.D. Cal. Sept. 18, 2013),
 4 *aff’d*, 603 F. App’x 618 (9th Cir. 2015) (quoting *Peak-Las Positas Partners v. Bollag*, 172 Cal.
 5 App. 4th 101, 114 (2009)); *Chavez v. FCA US LLC*, No. EDCV 19-01850 TJH (SHKx), 2020 WL
 6 8457485, at *1 (C.D. Cal. Dec. 7, 2020) (“FCA’s aggressive litigation strategy increased the
 7 number of hours that Chavez’s attorneys had to work on this case.”).

8 **1. This litigation overwhelmingly concerned the breach of contract claim**
 9 **and injunctive relief.**

10 It cannot be reasonably disputed that all of NAF’s claims stemmed from Defendants’ own
 11 nefarious behavior: Defendants misrepresented their identities to infiltrate NAF conferences,
 12 recorded audio and video, and then published highly misleading versions of that video, all of
 13 which breached the NAF Agreements. The vast majority of this litigation (including written and
 14 oral discovery), the temporary restraining order, the preliminary injunction, and summary
 15 judgment, have revolved around the breach of contract claims and fending off Defendants’
 16 defenses and counterarguments. (See ECF No. 727 at 1-15.)

17 Defendants nevertheless argue that NAF is entitled to limited attorneys’ fees because it
 18 only achieved injunctive relief, and did not achieve any monetary relief. (Opp. at 9-10.)
 19 Defendants’ six-year effort to avoid that exact result belies that argument.

20 “[T]he most critical factor in determining the reasonableness of a fee award is the degree
 21 of success obtained.” *Klein v. City of Laguna Beach*, 810 F.3d 693, 698 (9th Cir. 2016) (cleaned
 22 up). Like in certain civil rights cases, recovery of monetary damages was not the primary
 23 purpose of this litigation. *See id.* Indeed, by signing the Exhibitor Agreement, Defendants
 24 “agree[d] that monetary damages would *not* be a sufficient remedy for any breach of this
 25 agreement . . . and that NAF will be entitled to specific performance and injunctive relief as
 26 remedies for any such breach.” (ECF Nos. 666-12, 666-13 (emphasis added).) And NAF has
 27 repeatedly argued, and the record has made clear, that the Permanent Injunction is the primary
 28 relief NAF sought because of the irreparable harm NAF and its members face when NAF’s

confidential information is disclosed. (ECF No. 665 at 20-21 (showing that irreparable harm to NAF will occur without the entry of a permanent injunction).) That NAF voluntarily dismissed certain claims early-on and then dismissed the remaining claims immediately after obtaining the Permanent Injunction further evidences that fact. (*See* ECF No. 721.) That is all courts require to award fees. *See Klein*, 810 F.3d at 700 (reversing denial of fees where plaintiff won nominal damages but “gained the [injunctive] relief that he primarily sought when the challenged law was amended”); *In re HP Laser Printer Litig.*, No. SACV 07-0667 AG (RNBx), 2011 WL 3861703, at *2 (C.D. Cal. Aug. 31, 2011) (awarding \$4.7 million in attorneys’ fees where “primary relief” obtained was injunctive and the damages were nominal).⁴

2. NAF is entitled to attorneys’ fees for related claims and matters, regardless of their outcome.

Defendants next contend that the Court should reduce NAF’s fees (1) for purportedly abandoned claims and (2) for time spent on unsuccessful or unrelated litigation tasks. (Opp. at 9-10, 19-20.) Those arguments lacks merit.

a. NAF is entitled to fees spent on NAF’s non-contract claims.

NAF is entitled to reasonable attorneys’ fees for dismissed related claims. Under Section 1717, a party may recover contractual attorneys’ fees for fees incurred on non-contract claims under two circumstances. First, the language of a fees provision itself might support an award of attorney fees to the prevailing party for work performed on unsuccessful non-contract claims. *Santisas v. Goodin*, 17 Cal. 4th 599, 608 (1998) (fees incurred “arising out of the execution of th[e] agreement or the sale” included tort claims). For example, the Ninth Circuit has held that fees incurred for non-contract claims may be recovered under fees provisions covering disputes “arising out of or in connection with” the contract and provisions providing for recovery in “any suit or other proceeding with respect to the subject matter of enforcement of” the contract. *See*

⁴ Quoting *McGinnis v. Kentucky Fried Chicken of California*, Defendants argue that “[t]he district court must reduce the attorneys’ fees award so that it is commensurate with the extent of the plaintiff’s success.” (Opp. at 9 (quoting 51 F.3d 805, 810 (9th Cir. 1994).) But *McGinnis* expressly limited that rule to situations “where the relief sought and obtained is limited to money, [as] the terms ‘extent of success’ and ‘level of success’ are euphemistic ways of referring to money.” *McGinnis*, 51 F.3d at 810. The rule therefore is not applicable here.

1 *Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932, 939 (9th Cir. 1999); *see also* 3250 Wilshire Blvd.
 2 Bldg. v. *W.R. Grace & Co.*, 990 F.2d 487, 489 (9th Cir. 1993).

3 Like the provisions at issue in *Santisas*, *Marsu*, and *Wilshire*, NAF's fees provision
 4 broadly includes any fees incurred "in handling or responding to any violations of any provision
 5 of this entire Agreement[.]" (*See* ECF Nos. 666-12, 666-13 ¶ 16.) And Defendants cannot
 6 dispute that NAF filed this action, including its non-contract claims, as a response to Defendants'
 7 breach of the NAF Agreements. Nor is NAF's dismissal of its non-contract claims a barrier to
 8 recovery because they share "a common core of facts" with the breach of contract claim. *See*
 9 *Marsu*, 185 F.3d at 939 (affirming award of contractual fees for unsuccessful tort claims).

10 Second, even if the EA's fees provision does not cover non-contract claims, a prevailing
 11 party may also recover fees "incurred for representation on an issue common to both" the contract
 12 claim and non-contract claims. *Logtale, Ltd. v. IKOR, Inc.*, No. 11-CV-05452-EDL, 2016 WL
 13 7743405, at *2 (N.D. Cal. Oct. 14, 2016), *aff'd*, 738 F. App'x 422 (9th Cir. 2018). "This is true
 14 even where the party did not prevail on the related cause of action." *Id.* As the lion's share of
 15 issues in this case were about the breach of contract claim, Defendants lack any basis for claiming
 16 that fees should be cut by 90%.⁵

17 In addition, NAF's voluntary reduction of nearly 40%, includes a 25% reduction for, *inter*
 18 *alia*, "any time spent in connection with NAF's non-contract claims." (ECF No. 727 at 24.)

19 **b. NAF is entitled to fees incurred to further its litigation goals.**

20 Defendants also provide no meritorious basis for accusing NAF of wrongly seeking fees
 21 for tasks that were unsuccessful or that did not contribute to NAF's litigation goals. (Opp. at 19.)

22 "[A] party who ultimately prevails on a contract action is entitled to all of its fees,
 23 including fees incurred during the lawsuit in proceedings where it did not prevail." *Frog Creek*
 24

25 ⁵ Applying Defendants' two part test for abandoned claims ends in the same result. (*See*
 26 Opp. at 9 (citing *De Amaral v. Goldsmith & Hull*, No. 12-CV-03580-WHO, 2014 WL 1309954,
 27 at *4 (N.D. Cal., Apr. 1, 2014)).) As discussed, NAF's voluntarily dismissed claims are related to
 28 NAF's breach of contract claim because they "arose from the same course of conduct." *See*
Schwarz v. Sec'y of Health & Hum. Servs., 73 F.3d 895, 903 (9th Cir. 1995). And it is beyond
 dispute that the Permanent Injunction was the primary relief sought by NAF.

1 *Partners, LLC v. Vance Brown, Inc.*, 206 Cal. App. 4th 515, 546 (2012); *PQ Labs, Inc. v. Qi*, No.
 2 12-0450 CW, 2015 WL 224970, at *2 (N.D. Cal. Jan. 16, 2015) (allowing winning parties to
 3 recover attorneys' fees for stages it lost); *Bonner v. Fuji Photo Film*, No. C 06-04374 CRB, 2008
 4 WL 410260, at *2 (N.D. Cal. Feb. 12, 2008) (same under California law). The prevailing party is
 5 "entitled to all attorney's fees reasonably expended in pursuing th[e] claim" because "time spent
 6 on a losing stage of litigation contributes to success" and "constitutes a step toward victory."
 7 *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1052-53 (9th Cir. 1991).

8 Defendants primarily claim that NAF wrongfully seeks fees for work related to NAF's
 9 motion to limit Defendants' response to a Congressional subpoena and a related motion to hold
 10 Defendants in contempt for disclosing too much information to Congress.⁶ Those efforts were
 11 closely connected to NAF's primary litigation goal of ensuring that Defendants did not cause
 12 irreparable harm by (again) disclosing NAF's confidential information.⁷ Indeed, this Court's
 13 orders on the matter recognized the same. (*See* ECF Nos. 155, 314, 356.) Like NAF's
 14 monitoring of the criminal proceedings against Daleiden and NAF's settlement with the former
 15 co-defendant Newman (*see* Opp. at 19-20), NAF reasonably expended time on issues pertaining
 16 to the Congressional subpoena because it was a necessary step to ensuring the confidentiality of
 17 the information that Daleiden illicitly obtained.

18 This case is therefore nothing like the two that Defendants cite, where the courts reduced
 19 attorneys' fees for work that "unreasonably protracted the litigation," *Jankey v. Poop Deck*, 537
 20 F.3d 1122, 1133 (9th Cir. 2008), and "public relations work which did not contribute, directly and
 21 substantially, to the attainment of appellees' litigation goals[.]" *Davis v. City & County of San*
 22 *Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992), *opinion vacated in part on other grounds on*
 23 *denial of reh'g*, 984 F.2d 345 (9th Cir. 1993).

24 _____
 25 ⁶ At the time, this Court noted that Defendants had acted "contrary to [this Court's]
 Order" by producing materials "covered by the TRO," but "not covered by the subpoena." (ECF
 No. 354 at 16, n.18.)

26 _____
 27 ⁷ Indeed, shortly after Defendants' disclosure of NAF's confidential information to
 Congress, Daleiden's "great friend" began publishing that material on the internet, resulting in the
 28 exact type of harassment, intimidation, and threats against NAF's members that this litigation was
 initiated to prevent. (ECF No. 221-4 at 1-7.)

1 **3. NAF used a reasonable number of timekeepers.**

2 Defendants propose a blanket 50% reduction based on a gross mischaracterization of the
3 size of the team. (*See Opp.* at 11-12.) While NAF seeks fees for twenty-two timekeepers, only a
4 few of those timekeepers were actively involved at any given time, and only one timekeeper,
5 Derek Foran, has worked on the case continuously since 2015. (ECF Nos. 756-2 ¶ 40, 756-3.)

6 Courts will not reduce an award of attorneys' fees on the basis of overstaffing if the
7 defendants only "offer a general and unsubstantiated allegation of duplication of efforts." *PQ*
8 *Labs*, 2015 WL 224970, at *2 (refusing to reduce fees for overstaffing based on only declaration
9 comparing defendants' level of staffing to that of plaintiffs). That is all Defendants offer here.

10 It is also well established that "[p]articipation of more than one attorney does not
11 necessarily amount to unnecessary duplication of effort." *Democratic Party of Wash. State v.*
12 *Reed*, 388 F.3d 1281, 1286 (9th Cir. 2004). Defendants do not attempt to explain "how the
13 allegedly duplicative work could have been performed differently." *See Lira v. Cate*, No. C 00-
14 0905 SI, 2010 WL 727979, at *6 (N.D. Cal. Feb. 26, 2010). Nor do Defendants "identify any
15 specific duplications," beyond suggesting that timekeepers should not have attended team
16 meetings. *See PQ Labs, Inc.*, 2015 WL 224970, at *2. But litigation teams are allowed to confer
17 with each another and review one another's work, and seeking fees for these activities is not
18 excessive if their tasks reflect an appropriate division of labor when considering the complexity
19 of the case. *Harlow v. Metro. Life Ins. Co.*, 379 F. Supp. 3d 1046, 1057 (C.D. Cal. 2019).

20 NAF also efficiently staffed the case. Mr. Foran supervised junior attorneys who
21 performed tasks that would normally be assigned to more senior attorneys at the firm. (ECF No.
22 756-2 ¶ 7.) He also appropriately delegated tasks based on seniority and billing rate, with highly
23 qualified, but less costly associates, completing work appropriate for their skill level. (*Id.*) So,
24 this case is nothing like *Carpenters Pension Tr. Fund for N. Cal. v. Walker*, No. 12-cv-01447-
25 WHO, 2015 WL 1050479, at *2 (N.D. Cal. Mar. 9, 2015), where three attorneys with over twenty
26 years of experience worked on a "not particularly complex" matter and did not delegate "matters
27 that could have been accomplished by less senior attorneys."

28 Defendants also continue to ignore that NAF's voluntary 40% reduction included the

1 exclusion of any timekeeper who had billed less than 100 total hours on the matter—a reduction
2 of over \$2,300,000.00. (ECF No. 756-2 ¶¶ 8-9.)

3 **B. NAF’s Time Entries Showed the Compensable Work Performed.**

4 **1. NAF’s redactions were appropriate.**

5 Defendants first challenge NAF’s redactions of privileged information in the time entries.⁸
6 (See Opp. at 12-16.) Those arguments lack merit as NAF appropriately redacted privileged
7 information in accord with Ninth Circuit precedent.

8 Redactions protecting privileged information are permitted so long as a “neutral judge can
9 make a fair evaluation of the time expended, the nature and need for the service, and the
10 reasonable fees to be allowed.” *Parkridge Ltd. v. Indyzen, Inc.*, No. 16-cv-07387-JSW(LB), 2020
11 WL 9422351, at *5 (N.D. Cal. May 8, 2020) (citing *United Steelworkers of Am. v. Ret. Income*
12 *Plan for Hourly-Rated Emp. of ASARCO, Inc.*, 512 F.3d 555, 565 (9th Cir. 2008)). When
13 requesting attorneys’ fees, parties are “entitled for good reason to considerable secrecy about
14 what went on between client and counsel, and among counsel.” *Democratic Party*, 388 F.3d at
15 1286 (approving redactions covering attorney communications and topics of research); see
16 *Caggiano v. Comm’r of Soc. Sec. Admin.*, Case No. CV-19-05522-PHX-MTL, 2021 WL
17 2779499, at *4 (D. Ariz. July 2, 2021) (concluding that the plaintiff properly redacted
18 “descriptions for entries related to intra-office communications” as “[p]laintiff is entitled to
19 protect this information”).

20 That is exactly what NAF did here. NAF only redacted the precise subject matter of
21 privileged communications and those redactions “do not impair the ability of the court to judge
22 whether the work was an appropriate basis for fees.” See *Democratic Party*, 388 F.3d at 1286
23 (holding that redacted billing entries such as “Counsel call to discuss [REDACTED]” were
24 compensable). Indeed, the majority of NAF’s time entries had minimal to no redactions,

25 _____
26 ⁸ Sprinkling the arguments like pixie dust throughout the Opposition, Defendants assert
27 that NAF’s time entry narratives are “vague.” (See, e.g., Opp. at 11, 16, 19, and 20.) Yet even
28 the entries the Opposition excerpts detail the subject matter and purpose of the work performed.
(*Id.* at 16-18 (e.g., entry 602: “Work on memo analyzing strategies to challenge congressional
subpoenas”; entry 3512: “research 5th Amendment adverse inferences in the 9th Circuit.”).)

1 including 2,000 time entries that contain no redactions at all. NAF's entries, along with its other
 2 documentation (including a detailed thirty-one page declaration) provide Defendants and the
 3 Court with plenty of information to assess the reasonableness of the time NAF expended.⁹
 4 Though Defendants rely heavily on *Shame on You Prods., Inc. v. Banks* (Opp. at 14-15), it
 5 concurs with NAF's approach. No. CV 14-03512-MMM (JCx), 2016 WL 5929245, at *16 (C.D.
 6 Cal. Aug. 15, 2016), *aff'd*, 893 F.3d 661 (9th Cir. 2018) (approving redactions as time entries
 7 need "not specify the precise purpose of a conversation or the topics discussed" or researched).

8 In any event, if the Court deems it necessary, NAF is willing to submit its fully unredacted
 9 time records for *in camera* review. See *Vogel v. Tulaphorn*, No. CV 13-464 PSG (PLAx), 2014
 10 WL 12629679, at *10 (C.D. Cal. Jan. 30, 2014) (approving of *in camera* review to determine
 11 reasonableness of fees, but concluding that partially redacted billing entries were sufficient).¹⁰

12 **2. NAF's voluntary reduction already accounted for block billing.**

13 Defendants contend that NAF's block billing is inappropriate because it is impossible to
 14 determine whether time spent on a task was reasonable. (Opp. at 16 (citing *Banas*, 47 F. Supp. 3d
 15 at 966-97).) But less than 15% of NAF's entries were block billed. (See ECF No. 756-2 ¶ 9;
 16 Opp. at 16.) In contrast, the attorneys in *Banas* block billed 85% of their expended time, which
 17 resulted in the court reducing the attorneys' fees by 20%. *Banas*, 47 F. Supp. 3d at 968-69.

18 Further, in addition to excluding over \$2,300,000 for timekeepers who billed less than 100
 19 hours, NAF already voluntarily reduced its hours by 25% across *all* 4,924 of its entries to account
 20 for any duplicative efforts or vagueness due to block billing. Accordingly, Defendants' request
 21 for a 50% reduction (Opp. at 19) is not warranted. Even if the Court finds a reduction is
 22 warranted, the Court should apply no more than a 10% reduction to only the block billed time
 23 entries—a maximum reduction of \$193,635. See *Darling Int'l, Inc. v. Baywood Partners, Inc.*,

25 ⁹ NAF's redactions are consistent with this Court's instruction that "[t]he produced
 26 timesheets may be redacted to protect only privileged and other confidential information that I
 have allowed plaintiff to file under seal or treat as Attorneys Eyes Only." (ECF No. 739 at 1.)

27 ¹⁰ Under the Protective Order, NAF did not waive work-product or attorney client
 28 privilege by inadvertently failing to redact certain entries. (ECF No. 92 at 18-19; see ECF Nos.
 759-1 at 6, 759 at 15-16.)

No. C-05-3758 EMC, 2007 WL 4532233, at *9 (N.D. Cal. Dec. 19, 2007) (applying a 10% reduction to only time entries that were block billed).¹¹

3. Defendants' arguments about "too many whole or half numbers" and "0.1 entries" are contradictory and frivolous.

Defendants simultaneously argue that NAF's time entries contain "too many whole or half numbers," and too many "six-minute (0.1) entries." (Opp. at 22-23.) Apart from being logically inconsistent, Defendants are wrong on both counts.

Courts only apply a reduction to whole or half-hour time entries when they appear with such "extreme frequency" as to suggest timekeepers "likely rounded their times." *Good Morning to You Prods. Corp. v. Warner/Chappell Music, Inc.*, No. CV-13-4460-GHK (MRWx), 2016 WL 6156076, at *11 (C.D. Cal. Aug. 16, 2016); *Lota by Lota v. Home Depot U.S.A., Inc.*, No. 11-CV-05777-YGR, 2013 WL 6870006, at *12 (N.D. Cal. Dec. 31, 2013) (refusing requested reduction of half or whole hour entries despite "high percentage" of such entries); *Perrin v. Goodrich*, No. ED CV 08-00595 LLP (SSx), 2012 WL 1698296, at *2 (C.D. Cal. May 14, 2012), *aff'd*, No. 12-55944 (9th Cir. 2014) (refusing requested reduction because "not all of the entries . . . [were] in whole or half-hour increments").¹² Here, Defendants identify only eighty nine whole or half-hour entries—or just 1.8% of NAF's entries—hardly an "extreme frequency." (See Opp. at 22.)

Defendants' concern over "numerous 0.1 entries" is also unfounded. (See Opp. at 23.) Entries billed in 0.1 hour increments actually "further reduc[e] the likelihood that inflation has occurred" due to other billing practices. *Kalani v. Starbucks Corp.*, No. 13-CV-00734-LHK, 2016 WL 379623, at *7 (N.D. Cal. Feb. 1, 2016). Defendants' only cited case emphasized that

¹¹ Defendants are wrong that NAF is not entitled to fees for clerical tasks. See *Smith v. Citifinancial Retail Servs.*, 2007 WL 2221072, at *2 (N.D. Cal. Aug. 2, 2007) ("It is inevitable that attorneys will spend some of their time on quasi-clerical tasks."); *Sierra Club v. U.S. E.P.A.*, 625 F. Supp. 2d 863, 868-69 (2007) (awarding \$115 per hour for "non-legal," clerical tasks).

¹² The cases Defendants cite agree. See *CityPlace Retail, L.L.C. v. Wells Fargo Bank, N.A.*, No. 18-CV-81689-Rosenberg/Reinhart, 2021 WL 3361172, at *7, 11-12 (S.D. Fla. Jan. 12, 2021) (applying 20% reduction where senior partner accounted for 20% of total hours, 74% of his entries were whole or half-hours, and he had "no entries ending in .4 or .9"); *Benihana of Tokyo, LLC v. Benihana, Inc.*, No. 14 Civ. 224 (PAE), 2020 WL 91412, at *7 (S.D.N.Y. Jan. 8, 2020) (applying reduction based on the "outsized number" of entries "appear[ing] to have been rounded to a whole number," the "scale of opaque billing entries," and the "many repeated time entries").

the lawyers had billed “multiple .1 hour entries on the same day” and “[m]any of th[o]se tasks reasonably took a fraction of six minutes and should have been consolidated into one six-minute task.” *Hernandez v. Grullense*, No. 12-cv-03257-WHO, 2014 WL 1724356, at *8 (N.D. Cal. Apr. 30, 2014). In contrast, less than 5% of NAF’s 4,924 entries are for “0.1” hours, and those entries are spread across the entire six years of litigation. (*See Opp.* at 23.)

III. NAF ADEQUATELY DOCUMENTED ITS NON-TAXABLE COSTS.

As the prevailing party under a contract providing for “reasonable attorney’s fees,” NAF is entitled to recover non-taxable costs that would customarily be charged to the client. Section 1717; *Logtale, Ltd. v. IKOR, Inc.*, 738 F. App’x 422, 426 (9th Cir. 2018) (awarding non-taxable costs in a breach of contract claim under Section 1717). Contrary to Defendants’ assertion, this Court awarded PPFA “the non-statutory costs they [sought],” explaining that “[w]hile not particularly fulsome, the declarations provide a sufficient description of the costs.” *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, No. 16-cv-00236-WHO, 2020 WL 7626410, at *8 (N.D. Cal. Dec. 22, 2020). Here, NAF has provided a detailed declaration describing the non-taxable costs incurred in this litigation. (ECF No. 756-2, ¶¶ 104-09.)

Further, as the cases that Defendants cite show, insufficient documentation is not a basis to deny all NAF’s non-taxable costs. (*Opp.* at 23.) In *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326 (N.D. Cal. 2014), when counsel “provided no documentation supporting the claimed expenses,” the court assessed the reasonableness of the costs by ordering the plaintiffs to “file an itemization listing the expenses by category and the total amount advanced for each category.” *Id.* at 334. And in *Banas*, rather than denying all non-taxable costs based on counsel’s failure to provide “any documentation,” the court applied a 10% reduction. *Banas*, 47 F. Supp. 3d at 981. Here, NAF has provided a declaration describing the categories of non-taxable costs that it is seeking. (ECF No. 756-2, ¶¶ 104-09.)

CONCLUSION

NAF respectfully requests the court award NAF \$6,933,374.25 in attorneys’ fees and \$29,358.30 in non-taxable costs.

1 Dated: November 3, 2021

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